Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

HAGGAR CLOTHING CO.,

Petitioner,

v.

JIMMY PALASOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff can prove that he personally was a victim of intentional age discrimination by speculating that others might have been discriminated against.

2. Whether comments that contain no age animus are probative of discriminatory intent.

3. Whether an employer's use or consideration of a voluntary severance program for employees over 40 years of age is evidence of age discrimination.

CORPORATE DISCLOSURE STATEMENT

Petitioner Haggar Clothing Co. is wholly owned by Haggar Corp., a publicly held company listed on NASDAQ (HGGR).

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Haggar Clothing Co., the Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Fifth Circuit entered in this case on September 3, 2003.

OPINIONS BELOW

The opinion of the district court is unpublished and can be found at *Palasota v. Haggar Clothing Co.*, 2002 U.S. Dist. LEXIS 11505 (N.D. Tex. June 26, 2002) and Appendix B hereto. The opinion of the Fifth Circuit Court of Appeals is reported at *Palasota v. Haggar Clothing Co.*, 342 F.3d 569 (5th Cir. 2003) and is included as Appendix A hereto. The order of the Fifth Circuit denying the petition for rehearing en banc in this case is unpublished, and can be found at *Palasota v. Haggar Clothing Co.*, 2003 U.S. App. LEXIS 20963 (5th Cir. 2003) and Appendix C hereto.

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals' opinion, which is the judgment sought to be reviewed, was entered on September 3, 2003. The Fifth Circuit denied Petitioner's timely-filed Petition for Rehearing on October 1, 2003.

Jurisdiction in the Supreme Court is established by 28 U.S.C. § 1254(1).

RELEVANT STATUTES

Section 623 of the Age Discrimination in Employment Act provides in relevant part:

> Prohibition of age discrimination
>
> (a) Employer practices
>
> It shall be unlawful for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization —

* * *

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section —

* * *

(B) to observe the terms of a bona fide employee benefit plan —

* * *

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

29 U.S.C. § 623.

STATEMENT OF THE CASE

(i) Nature of the Case

Respondent Jimmy Palasota's claims in the district court were brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*., and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq*. As such, the district court had federal question jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(4). The case was tried to a jury, which found in favor of Respondent on his claim of age discrimination and against Respondent on his claim of sex discrimination. The district court then granted Petitioner's post-verdict Motion for Judgment as a Matter of Law. Respondent timely appealed from the district court's final judgment that disposed of all parties' claims. As such, the Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. The Court of Appeals reversed the judgment as a matter of law and remanded. This petition followed.

(ii) Statement of Facts

Palasota was employed by Haggar as a sales associate. His largest account (80% of his business) stopped doing business with Haggar. At the same time, retail outlets were consolidating the manner in which they were buying clothes from Haggar and other manufacturers, which resulted in a need for fewer sales associates. Palasota was given an alternate sales territory, but he expressed dissatisfaction with it to his supervisor and requested that Haggar offer voluntary severance.

Palasota, along with several other sales associates, was offered voluntary severance. Several of the sales associates accepted severance. Others did not accept severance and continued working. Palasota's position was eliminated two months after severance was offered to him, and he was terminated.

At trial, Palasota claimed that Haggar had concocted a scheme to replace sales associates with younger marketing representatives. He argued that a voluntary severance program and replacement of employees by marketing representatives 17 months after his termination proved that he was discriminated against.

However, Palasota admitted the following:

(1) he was never replaced by a marketing representative;

(2) the individuals (Bond and Bailey) who took over his remaining accounts, and the additional accounts he wanted, were at or near his age and well qualified; and

(3) the assignment of accounts to Bond and Bailey was not discriminatory.

Given Palasota's testimony that he was not discriminated against, the Fifth Circuit — to support the jury's finding — relied upon: (1) speculation about what occurred to other employees; (2) the voluntary severance program; and (3) comments unrelated to age or not discriminatory to reverse the trial court's granting of the motion for judgment as a matter of law.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Fifth Circuit Eliminates A Fundamental Requirement In An Employment Discrimination Case: That The Plaintiff Prove That He Was The Victim Of Intentional Discrimination.

A fundamental concept of discrimination law is that it prohibits discrimination against a specific individual — it does not provide a remedy for discrimination "in the air, so to speak." *Cf. Palsgraf v. Long Island Railroad*, 162 N.E. 99, 99 (1928) ("Proof of negligence in the air, so to speak, will not do.") The Age Discrimination in Employment Act expressly states that it is unlawful to discriminate "against any individual" on the basis of age. 29 U.S.C. § 626(a)(1). This statute has consistently been interpreted to mean that the plaintiff bears the burden to prove that he or she was discriminated against.

In *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 153 (2000), this Court reaffirmed that "[t]he ultimate question in every employment discrimination case is whether the *plaintiff* was the victim of intentional discrimination." (emphasis added). "When the plaintiff alleges disparate treatment, [as Palasota has done in this case] 'liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision.'" *Ibid* at 140, *quoting Hazen Paper v. Biggins*, 507 U.S. 604, 610 (1993). That is, the plaintiff's age must have "actually played a role in (the employer's decision making) process and had a determinative influence on the outcome." *Ibid*; *see also Texas Department of Community Affairs v. Burdine*, 450 U.S.248, 256 (1981) (plaintiff retains the "ultimate burden of persuasion that she has been the victim of

intentional discrimination."); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 848 (1st Cir. 1993) (focus in a disparate treatment case is on "how a particular individual was treated and why"), *cert. denied*, 511 U.S. 1018 (1994).

The Fifth Circuit's decision eliminates Plaintiff's burden to prove that he was the victim of intentional discrimination. It ignored Palasota's testimony that he was not discriminated against: at least 80% of his job was eliminated when his largest account stopped buying from Haggar, the employees who replaced him on his remaining accounts were well qualified and in his age group, and their assignment to those accounts was not discriminatory.

Rather than relying on evidence about what happened to Palasota, as required by the statute and precedent, the Fifth Circuit relied upon what happened to other employees — both when Palasota was terminated and during the five-year time period from his termination to trial — without any regard for *why* those employees left Haggar's workforce. The Fifth Circuit extrapolated age discrimination from the mere fact that employees left Haggar's workforce. This was pure speculation. The Fifth Circuit did so without regard — as mandated by this Court and numerous courts of appeal — to any factors related to the hiring and termination of the employees (including employees who voluntarily accepted severance packages, who retired, who left for personal reasons, who were terminated for cause, or who lost jobs due to market consolidation). The record is bereft of any evidence that these individuals were terminated because of their ages.

In *Bazemore v. Friday*, 478 U.S. 385 (1986), this Court discussed the circumstances in which statistical (numerical) evidence would be probative of discrimination. While not every single potential variable must be considered, it is clear that the main variables must be considered in order for the statistical or numerical evidence to have relevance. *Ibid.* at 400 and n.10. Further, every circuit that has addressed this gross numerical type of comparative proof has found it insufficient to prove age discrimination. *LeBlanc*, 6 F.3d at 848 (statistics that did not account for major variables were not probative of discrimination); *Smith v. Xerox Corp.*, 196 F.3d 358, 370-371 (2d Cir. 1999); *Bruno v. W. B. Saunders Co.*, 882 F.2d 260 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); *Vaughn v. MetraHealth Cos.*, 145 F.3d 97 (4th Cir. 1999) (numerical data requires expert testimony); *Strickland v. Federal Express Corp.*, 45 Fed Appx. 421, 424-425 (6th Cir. 2002); *Koski v. Standex Int'l Corp.*, 307 F.3d 672, 675-676, 678-679 (7th Cir. 2002) (numerical evidence must be offered in context to be probative); *Bennett v. Watters*, 260 F.3d 925, 930 (8th Cir. 2001); *Pottenger v. Potlach Corp.*, 329 F.3d 740, 747-748 (9th Cir. 2003); *Martinez v. Wyoming*, 218 F.3d 1133, 1138-1138 (10th Cir. 2000) (statistical evidence must pass a "threshold of reliability"); *Evans v. McClain, Inc.*, 131 F.3d 957, 963 (11th Cir. 1997) (without an analytical framework, numerical evidence is "virtually meaningless"); *Coward v. ADT Sec. Sys.*, 140 F.3d 271, 274-275 (D.C. Cir. 1998).

In sum, these decisions require that the numerical data be linked to a discriminatory intent by a proven statistical methodology. This is especially important in age discrimination cases, where, as the Eighth Circuit has recognized, aging employees naturally move out of the workforce into retirement, and younger employees move in. *Bennett*, 260 F.3d at 930

(rejecting plaintiff's gross statistical evidence relating to hiring and stating "it is not surprising to find older workers moving out of a work force and younger workers moving in"). Without a proper analysis, the gross numerical data is just that — gross data — and does not support a claim of discrimination.

The result of the Fifth Circuit's decision is startling: it lowers the burden of proof. A plaintiff need merely show that older workers leave the workforce and younger workers come into the workforce. A plaintiff can make that showing without consideration of whether such information has any statistical relevance to age discrimination. And, according to the Fifth Circuit, this Plaintiff can also make that showing even over his own testimony that the decisions related to *his* employment were not discriminatory.

In short, the Fifth Circuit's opinion mandates denial of a well-founded Rule 50 motion when the Plaintiff admits that he was not discriminated against, but instead speculates that others may have been discriminated against. This decision allows plaintiffs who were not discriminated against to recover by eliminating the burden of proof required by the statute, *Burdine*, *Hazen Paper*, and *Reeves*. It permits, to paraphrase Justice Cardozo, denial of a meritorious Rule 50 motion based upon proof of discrimination in the air.

II. The Fifth Circuit's Opinion Lowers The Plaintiff's Burden Of Proof Because It Holds That Comments That Are Not Age Related Or Tainted With Age Animus Are Probative Of Age Discrimination.

The Fifth Circuit misinterpreted *Reeves* to hold that statements that are not related to age or are not discriminatory are evidence of age discrimination, including statements such as needing "race horses not plow horses" or an employee is from the "old school of selling" or an employer has an "aging and graying work force." In doing so, the Fifth Circuit announced a new interpretation of *Reeves* and a new rule of law for analyzing comments: "so long as remarks are not the only evidence of pretext, they are probative of discriminatory intent" — regardless of whether the remarks relate to age or show an age based animus.

That is not the law. Quite frankly this statement by the Fifth Circuit appears to be a return to some sort of dual standard for evidence of discrimination, which this Court recently rejected. *Cf. Desert Palace, Inc. v. Costa*, __ U.S. __; 123 S. Ct. 2148; 156 L. Ed. 2d 84 (2003) (rejecting a higher "direct evidence" standard in employment discrimination cases when considering a mixed motive jury charge and stating that "The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" *quoting Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n.17 (1957)).

As a threshold matter, *Reeves* requires that the Court actually determine whether the comments themselves are evidence of age discrimination. Under *Reeves*, for comments

to be probative of age discrimination, first, the comment must refer to age, and second, consistent with the Court's admonition in *Hazen Paper Company v. Biggins*, 507 U.S. 604 (1993), the comment must evidence negative stereotypical views of older workers. *Reeves*, 530 U.S. at 151-154. It is only after the comments pass this threshold that the court can consider whether "although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude the reason was discriminatory." *Ibid.* at 148. The Fifth Circuit has reversed this analysis and put the cart before the horse.

Two of the statements in this case do not refer to age in any manner. First, the comment that Haggar needs "racehorses, not plowhorses" — racehorses or plowhorses can be young or old. This statement has nothing to do with age, but deals with talent. It is not related to age in any fashion. Second, the comment that Plaintiff was from the "old school of selling" relates to traditional ideas or practices, not age — and the Fifth Circuit's holding to the contrary conflicts with other circuits. *Gonzalez v. El Dia, Inc*, 304 F.3d 63, 70 (1st Cir. 2002) (referring to plaintiff's "old ways" not evidence of age discrimination); *Hoffman v. MCA, Inc.*, 144 F.3d 1117, 1124 (7th Cir. 1998) (reference to the plaintiff as an "old fashioned hack salesman" made no reference to age and was insufficient to establish pretext, even collectively with other statements).

The third statement, that Haggar's sales force was "aging and graying" referred to age, but it did not do so in a negative or stereotypical manner. It was merely a factual statement about the makeup of the workforce. A statement of fact, that an employer has "an aging and graying sales force,"

is not evidence of discrimination. The Fifth Circuit's misinterpretation of *Reeves* creates two problems for discrimination cases:

First, any comment that someone subjectively believes to be age related — but which objectively is not — is now probative of discriminatory intent.

Second, under the Fifth Circuit's decision, stating a fact — "that we have an aging, graying sales force" — is now evidence of discriminatory intent. Any employer considering succession planning, considering offering legal early retirement for its workers, or conducting long term business planning will be forced to ignore or subvert the facts about the demographics of their workforce and engage in some type of factual fiction. Comments about the age of the workforce in this context are not evidence of age discrimination. They are statements of fact and business reality. *Schuster v. Lucent Technologies, Inc.*, 327 F.3d 569, 575-576 (7th Cir. 2003) (employer inquiring about employee's plans to retire not evidence of age discrimination); *Golove v. Monroe Community College*, 29 Fed. Appx. 695, 699 (2d Cir. 2002) (employer mentioning age in question not probative of age discrimination because statement did not indicate age-based animus).

Contrast these comments to the comments in *Reeves*, that the employee "was so old he must have come over on the Mayflower" and that "he was too damn old to do his job." *Reeves*, 530 U.S. at 151. The *Reeves* comments are age-based and evidence a negative stereotypical view about older employees (that they can't do the job).

The Fifth Circuit has misinterpreted *Reeves* and reversed the analysis that *Reeves* and the courts of appeals use to determine whether comments are probative of discriminatory intent. In doing so, the Fifth Circuit eliminated any requirement that the remarks be age related, show any discriminatory animus, or be made by a decision maker.

III. Offering A Voluntary Severance Program For Employees Over A Certain Age Is Not Evidence Of Age Discrimination.

The Fifth Circuit found that the linchpin of Palasota's case was a memorandum written by Palasota's supervisor that proposed offering voluntary severance packages to Palasota and certain other employees over age 40.

This holding is contrary to the holdings of other circuits. *Henn v. National Geographic Society*, 819 F.2d 824,828 (7th Cir.) (an offer of incentives to retire early is a benefit to the recipient, not a sign of discrimination.), *cert. denied*, 484 U.S. 964 (1997); *Pitasi v. Gartner Group, Inc.*, 184 F.3d 709,714-715 and n.7 (7th Cir. 1999) (offer of early retirement in face of reduction in force, not evidence of age discrimination); *Raskin v. The Wyatt Co.*, 125 F.3d 55, 61 (2d Cir. 1997) ("There is nothing inconsistent with the ADEA in offering older employees compensation for leaving the workforce"); *Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (attractive terms of a severance plan offered to older employees is not evidence of age discrimination); *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251, 255 (1st Cir. 1986) (voluntary retirement program not evidence of age discrimination); *cf.* 29 U.S.C. § 623(f)(2)(b)(ii) (not unlawful to offer voluntary early retirement); *Bodnar v. Synpol*, 843 F.2d 190, 193 (5th Cir.), *cert. denied*, 488 U.S. 908 (1988).

Courts consistently hold that offering a voluntary severance package only to individuals over a certain age does not violate the ADEA and is not evidence of age discrimination. The rationale behind that holding is sound: an offer of a voluntary severance package is a benefit to an employee — it gives the employee an option of taking the severance or taking the risk of future adverse action against him. *See, e.g., Schuler*, 848 F.2d at 278 (severance package is a "carrot" that does not violate the Age Discrimination in Employment Act).

The Fifth Circuit's decision is fundamentally flawed. The Fifth Circuit states that because the Plaintiff was terminated two months after he turned down the severance, the offer of severance is evidence of age discrimination. However, that reasoning misses the point of offering voluntary severance — employers do so in order to avoid terminating individuals when business conditions dictate a reduction in force. The employee's decision is to accept the voluntary severance or accept the risk of the status quo — which includes the risk that business conditions may result in elimination of the employee's position and termination of employment. If fewer people accept voluntary severance than needed, the remaining individuals will face the possibility of termination. Here, the record shows that some of the individuals took voluntary severance, some were terminated, and some continued working even through the date of trial. This is just what one would expect when a voluntary severance program is offered. Notably, Palasota did not attempt to demonstrate that that he was older or better qualified than sales associates retained by Haggar.

Employers, like Haggar, rely on the well-established body of law that supports offering early retirement and

voluntary severance, in running their businesses. The Fifth Circuit's decision telegraphs a clear and unmistakable message to employers: Offer voluntary severance programs at your peril because they will be used against you in age discrimination lawsuits. Faced with this opinion, employers may well choose the safer but much less desirable alternative of not offering early retirements or voluntary severance packages when business dictates cutting back the workforce.

Further, the Fifth Circuit has turned the law on its head by allowing an employee to use something he asked for as evidence of unlawful discrimination. Palasota admitted that he asked his supervisor whether the company would offer voluntary severance because he was dissatisfied with his sales territory, and it is undisputed that he was not the only employee to do so. Yet, the Fifth Circuit held that the memorandum written by Palasota's supervisor in response to Palasota's request that Haggar offer severance was evidence of age discrimination, essentially holding that an employee can request severance package and later say the company's decision to honor that request is evidence of age discrimination.

CONCLUSION

Petitioner Haggar Clothing Co. respectfully prays that the Court issue a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED SEPTEMBER 3, 2003

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

02-10844

JIMMY PALASOTA,

Plaintiff-Appellant,

VERSUS

HAGGAR CLOTHING CO.,

Defendant-Appellee.

September 3, 2003, Filed

Before DAVIS, SMITH, and DUHE, Circuit Judges.

PER CURIAM:

The sole issue before us in this age discrimination in employment case is whether the district court erred in granting Judgment as a Matter of Law to Defendant, Haggar Clothing Co. ("Haggar") after the jury returned a verdict in favor of Plaintiff Jimmy Palasota ("Palasota"). Our review of the record convinces us that the district court did err. Accordingly, we reverse the judgment of the district court, reinstate the jury verdict in favor of Palasota and remand for further proceedings.

Appendix A

FACTS AND PROCEDURAL HISTORY

Palasota was employed as a Sales Associate by Haggar for twenty-eight years. When terminated on May 10, 1996, he was fifty-one years old. For most of his career, Palasota oversaw one of Haggar's key accounts, Dillard's Department Stores.[1] Palasota also serviced eight J.C. Penney's key accounts and various trade accounts. He was considered an "outstanding" employee who "had great relationships with customers" and "was second to none in his sales professionalism." R. 29:37, 43.

In the 1990s, Haggar's management sought to portray a younger image for the company. R. 30:147. Haggar created the Retail Marketing Associate ("RMA") program, and transferred many of the sales functions previously performed by Sales Associates to the RMA employees.[2] Indeed, ninety-five percent of the RMAs were females in their late twenties and early thirties, whereas ninety-five percent of the Sales

---

1. A key account is a high volume sales account that Haggar assigns only to its best Sales Associates. Unlike a high-volume key account, a trade account territory is made up of numerous lower-volume stores.

2. The former head of the J.C. Penney account for Haggar testified that "there was no difference" between the Sales Associates and the RMAs; individuals in both positions "were being asked to sell clothing for the Haggar Clothing Company," and the transfer of the sales function "was a continuing plan" to move the Sales Associate's responsibilities to the RMAs, who "were all much younger, primarily female gender." R. 29:45; 32:471-72; 32:510. Roxanne Jilek, a former RMA, stated that RMAs assumed the sales duties of the Sales Associates, resulting in an elimination of the latter's position. R. 30:206-07.

Associates were males between forty-five and fifty-five years of age. R. 29:57.

From 1993 to 1996, Haggar hired between 32 and 51 sales people, all of them RMAs and all, but four, of whom were under forty years of age. R. 29:73-74. During this same period, Haggar terminated 17 Sales Associates, all of whom were males over forty years of age. Plaintiff Ex. 81-85. Between December 1, 1996, and March 31, 1998, Haggar terminated 12 Sales Associates forty years of age or older, including Palasota, while hiring 13 new RMAs, only one of whom was over forty years of age. Plaintiff Ex. 67, 68. Haggar's chief financial officer testified that the increase in the number of RMAs and the decrease in the number of Sales Associates were related and offset each other in the company's sales budget. R. 32:508-09.

In late 1995, Haggar lost its account with Dillard's which comprised approximately 85% of Palasota's commissions. National Sales Manager James Thompson created a new territory consisting of J.C. Penney stores in Houston, San Antonio, and Austin, that would have generated 85% to 90% of Palasota's 1995 commission amount. R. 30:169; 32:479. However, Thompson left Haggar in December of 1995. Palasota contends that Thompson's replacement, Alan Burks, and Vice President of Sales/Casual Tim Lyons, refused to grant him the territory proposed by Thompson, relegating him to less lucrative trade accounts in East Texas and Louisiana.[3] R. 31:325.

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3. Thompson testified that this territory was not appropriately matched to Palasota's background and experience level, R. 32:482

(Cont'd)

Appendix A

On February 23, 1996, Lyons told Palasota that he could accept the trade account territory or a severance package.[4] Supp 2:5; R. 31:300-01. Palasota declined the severance offer and refused to resign. On February 23, 1996, after the meeting, Lyons sent a memo to four other members of Haggar's management. After noting Palasota's 28 years of service and his refusal to accept the severance package, Lyons wrote that "we have approximately 14 associates with this same amount of tenure who are in their early fifties or older. I strongly recommend that Human Resources look at developing a severance package for these individuals. . . . This could provide us the ability to thin the ranks in a fashion that will create good will and ease the anxiety of this transition period. . . ." The memo concluded that "the end result will be a sales organization that has its best people in a healthy account environment. . . ." Lyons Dep. Ex. 16. Of the 14 associates listed in the memo, all but two subsequently ended their employment with Haggar. Supp. R. 2:16.

(Cont'd)

and that Palasota was the best candidate to assume the accounts of the J.C. Penney stores located in San Antonio, Houston, and Austin. R. 29:80; 32:482.

4. In response to Palasota's concerns that the East Texas and Louisiana territory would yield smaller commissions, Lyons guaranteed Palasota, from January 1996 through may 1996, eighty percent of his 1995 salary of $ 175,000. R. 31:328, 330; Supp 2:48, 49. Haggar contends this decision insulated Palasota from its decision in the Fall of 1995 to pay its Sales Associates on straight commission, without a minimum guaranteed salary.

Appendix A

In March of 1996, without denying that the additional J.C. Penney stores were available, Lyons informed Palasota that he would be terminated. R. 31:301-02. On April 29, 1996, Palasota was notified in writing that his position was being "eliminated" due to a "reconfiguration of the sales force." Plaintiff Ex. 9. Following Palasota's termination, other Sales Associates were given the J.C. Penney account that Thompson had slated for Palasota, and in 1997, these Sales Associates were terminated and replaced by younger RMAs. R. 29:91-92; 33:692; Supp. R. 2:13-14.

Haggar portrays Palasota's termination as an effective resignation, resulting from his dissatisfaction with the low commission yield of his new territory and the severance package offer. Haggar notes that Palasota never told management that he believed the company was treating him unfairly or that RMAs were taking over his position. Palasota's only complaint was that he wanted 28 months' severance, rather than the standard 12 months'. Haggar disputes Palasota's testimony that Thompson and other members of management[5] promised Palasota additional J.C. Penney stores in San Antonio, Austin, or Houston. Haggar contends that Vice President of Retail Merchandising Ray Pierce, with whom Palasota never spoke about the subject, retained sole authority to open J.C. Penney stores to Haggar's Sales Associates. R. 31:334.

Palasota produced further evidence that Haggar's management was concerned with the appearance of its aging

5. Besides Thompson, Palasota testified that in the Fall of 1995 he spoke to Douglas Moore, Tim Markham, and Joe Schlesinger about the possibility of adding J.C. Penney stores to his territory.

sales force. In late 1995, Haggar's President, Frank Bracken, stated that he wanted "race horses" and not "plow horses," R. 32: 477, 512, while telling Palasota that he was out of the "old school" of selling. R. 32:478. Bracken announced at a sales meeting that there was a significant "graying of the sales force." R. 31:290, 405. Alan Burks, a member of management, stated at a sales executive meeting: "Hey, fellows, let's face it, we've got an ageing, graying sales force out there. Sales are bad, and we've got to figure out a way to get through it." R. 29:66.

After his termination, Palasota filed a charge of age and sex discrimination with the EEOC, which issued a determination finding cause on the age claim. At trial, a jury found Haggar liable under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, awarding Palasota $ 842,218.96 in backpay; the jury found no liability as to Palasota's Title VII claim.

Some months after the verdict, the district court granted Haggar's Motion for Judgment as a Matter of Law. The district court found that Palasota failed to demonstrate that Haggar had given preferential treatment to a younger employee and that evidence of treatment of other Sales Associates after Palasota left Haggar was not probative of whether age was a determinative factor in Palasota's discharge. Relying on a case predating *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000),[6] the court ruled that a reasonable jury

6. *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145, 148 L. Ed. 2d 957, 121 S. Ct. 1081 (2001).

could not conclude "without any inferences or presumptions" that age was a determinative factor in the company's termination decision. Further, the court found that all of the age-related comments made by Haggar's management were "stray remarks" and therefore not probative of discriminatory intent.

ANALYSIS

We review the district court's grant of judgment as a matter of law de novo. *Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 467 (5th Cir. 2002). We must examine all the evidence in the record as a whole and draw all reasonable inferences in favor of Palasota. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 at 137, 151, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). We do not, however, assess credibility of witnesses or otherwise weigh the evidence. *Lytle v. Household Mfg. Inc.*, 494 U.S. 545, 554-55, 110 S. Ct. 1331, 108 L. Ed. 2d 504 (1990).

Under the ADEA, it is "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). "When a plaintiff alleges disparate treatment, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision."[7] In other words, the plaintiff's age "must have actually played a role" in the employer's decision making process. *Id.*

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7. *Reeves, supra,* (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993)) (internal quotation marks omitted).

Appendix A

Where a case has been fully tried, it is unnecessary to "parse the evidence into discrete segments corresponding to the different stages" of the *McDonnell Douglas* framework. *Scott v. Univ. of Mississippi*, 148 F.3d 493, 504 (5th Cir. 1998) (citation omitted). Rather, the panel should examine whether the plaintiff has met his ultimate burden of proving that the employer terminated him because of age.[8] *Id.*

Judgment as a Matter of Law should not be granted unless "the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion." *Flowers v. S. Reg'l Physician Servs., Inc.*, 247 F.3d 229, 235 (5th Cir. 2001) (quotations and citations omitted). The panel must "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 151; *see also* FED. R. CIV. P. 50(a)(1).

Our reading of the record and the district court's opinions convinces us that it erred by: (1) holding that Palasota was required to show that a younger employee was given

8. *See also United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 713-14, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983) ("Because this case was fully tried on the merits it is surprising to find the parties and the Court of Appeals still addressing the question whether *Aikens* made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination *vel non*."); *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248, 252 (5th Cir. 1996) ("When a case has been fully tried on the merits, the adequacy of the showing at any stage of the *McDonnell Douglas* framework is unimportant; rather, the reviewing court must determine whether there was sufficient evidence from which a reasonable trier of fact could have concluded that age discrimination occurred.").

preferential treatment; (2) ignoring much evidence which supports the jury's verdict, including the February 23, 1996 memo; and (3) discounting the probative value of management's remarks, despite Palasota's establishment of a *prima facie* case. Under *Reeves*, Palasota's establishment of a *prima facie* case combined with doubt cast on Haggar's proffered supposed non-discriminatory explanation for termination—that Palasota voluntarily resigned—are sufficient to support liability. 530 U.S. at 147.

In earlier denying Haggar's Motion for Summary Judgment, the district court correctly found that Palasota established a *prima facie* case: (1) he was discharged; (2) he qualified for the position; (3) he was a member of a protected class; and (4) there was a material issue of fact as to whether he was discharged because of his age. Order of September 24, 2001, p. 6-8. On appeal, Haggar does not argue that Palasota failed to establish a *prima facie* case, nor, as discussed below, does it defend the district court's mistaken observation that Palasota was required to demonstrate preferential treatment of a younger employee. Instead, Haggar argues that Palasota's stated dissatisfaction with the loss of his Dillard's account and request for severance prove that he voluntarily resigned. Yet, the April 26, 1996, termination letter states that Palasota's "position has been eliminated" as a means of "re-configuring the sales staff." Plaintiff's Ex. 9. Haggar explains this inconsistency by contending that termination language was necessary for Palasota to receive extended medical benefits and severance pay.[9] However,

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9. Haggar contends that its insurance company required this designation for employees who sought extended benefits. Haggar

(Cont'd)

given the plain language of the termination letter, Palasota's previous rejection of Haggar's severance offer, and Haggar's refusal to link the loss of the Dillard's account to an overall down-sizing in its sales staff (the only other plausible non-discriminatory explanation for Palasota's termination), a reasonable jury could have "inferred from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves*, 530 U.S. at 147.[10]

The court also erred by holding that Palasota had to show that Haggar had given preferential treatment to a younger employee under "nearly identical" circumstances. Without discussing evidence favorable to Palasota, the court summarily concluded that his theory of the case—that Haggar sought to replace its largely older, male sales force with a younger female sales force—was insufficient to prove disparate treatment. The court stated that Palasota's "attempted comparison with the RMAs, general and conclusory as it was, does not" show preferential treatment under "nearly identical circumstances." Memorandum Order June 26, 2002, at 12.

(Cont'd)

also contends that it was necessary to include this language in the termination letter "so that Palasota could receive severance pay under what Lyons believed was Haggar's company policy." The jury was entitled to disbelieve this explanation for want of credibility.

10. *See also Nichols v. Lewis Grocer*, 138 F.3d 563, 568 (5th Cir. 1998) (noting that "a reasonable juror certainly may infer discrimination when an employer offers inconsistent explanations for the challenged employment action").

Appendix A

Treating younger workers more favorably is not the only way to prove age discrimination. A plaintiff must show that "(1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of discharge; and (4) he was either i) replaced by someone outside the protected class, ii) replaced by someone younger, or iii) *otherwise discharged because of his age.*" *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993) (emphasis added). Accepting Haggar's characterization of this dispute as a reduction-in-force case, the plaintiff need only show "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996) (quoting *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 812 (5th Cir. 1991)).[11] Therefore, Palasota was not required to demonstrate that the Sales Associates and RMAs were given preferential treatment or that he was immediately replaced by an RMA.

The district court observed that, though replacement by a younger worker was not a necessary component of Palasota's *prima facie* case, Palasota still "at the end of the day . . . has to compare himself to a younger worker under

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11. In *Amburgey*, this court further noted that, in reduction-in-force cases, the plaintiff must "produce some evidence that an employer has not treated age neutrally. . . . Specifically the evidence must lead the factfinder reasonably to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) that defendant regarded age as a negative factor in such consideration." 936 F.2d at 812 (citation omitted).

'nearly identical' circumstances to show that he was treated 'disparately' because of his age." Memorandum Order *supra* at 12 n.3. This runs counter to *Reeves*, which holds that the establishment of a *prima facie* case and evidence casting doubt on the veracity of the employer's explanation is sufficient to find liability. 530 U.S. at 147.

Palasota produced evidence which the district court did not address from which a reasonable juror could conclude that he was terminated as part of Haggar's plan to turn Sales Associate duties over to younger RMAs. For example, it did not address the February 23, 1996, memorandum from Tim Lyons to Haggar executives Frank Bracken, Joe Haggar, III, and Alan Burks. In that memo, Lyons discusses Palasota's displeasure with the company's offer of a standard severance package. Lyons then shifts focus, recommending severance packages for fourteen named Sales Associates, all of whom are specifically identified as over fifty years of age, in order to "thin the ranks" as part of a transition period. The memo states that, by eliminating employees over fifty years of age, "we will have the flexibility to bring on some new players that can help us achieve our growth plans."

To qualify as direct evidence, a document must be (1) age related, (2) proximate in time to the termination, (3) made by an individual with authority over the termination, and (4) related to the employment decision. *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996). The memo, which is undeniably age-related, was composed approximately two months before Palasota's termination. Lyons, Vice President of Sales/Casual, was empowered to terminate Palasota, as well as offer severance packages to other employees. In no

uncertain terms, the memo discusses a broad plan to "thin the ranks" of older Sales Associates in order to "ease the anxiety of this transition period."

Haggar contends the memo merely discusses the possibility of providing severance packages to three employees requesting them, including Palasota. This ignores the fact that 14 employees over fifty years of age, at least 11 of whom did not request severance packages, were targeted for offers. Haggar does not explain why, as part of its plan to "reconfigure" its sales staff, only older associates were selected, nor why RMAs were simultaneously hired to perform sales duties.

Though the offer of a severance package is not, by itself, evidence of age discrimination, *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192-93 (5th Cir. 1988), *cert. denied*, 488 U.S. 908, 102 L. Ed. 2d 248, 109 S. Ct. 260 (1988), such offers assume that employees "may decline the [early retirement] offer and keep working under lawful conditions." *Id.* (quoting *Henn v. Nat'l Geographic Soc'y*, 819 F.2d 824, 826 (7th Cir. 1987)). Within two months after Palasota refused to accept the severance package, he was "eliminated"; the stated reason for termination was a "reconfiguration of the sales force." Plaintiff's Ex. 9. Between December 1, 1996, and March 31, 1998, Haggar terminated twelve Sales Associates, including Palasota.[12] Plaintiff's Ex. 67, 68. Within one year after

12. The record shows that three other Sales Associates ended their employment on the same day as Palasota. R. 30:163; Plaintiff Ex. 81. Nine of the other fourteen Sales Associates over fifty years of age were either laid off, or otherwise terminated their employment, over the next five years. Plaintiff Ex. 67; Plaintiff Ex. 81.

Palasota's termination, the Sales Associates assigned to the J.C. Penney's account were terminated and replaced by RMAs. R. 29:91-92; 33:692; Supp 2:13-14. Ninety-five percent of the Sales Associates were males over the age forty, while ninety-five percent of the RMAs were females under forty. Haggar's chief financial officer testified that increases in the number of RMAs and declines in Sales Associates were designed to offset one another. R. 32:508-09. The former head of Haggar's J.C. Penney account testified that "there was no difference" between the RMAs and Sales Associates, and that the transition was part of a plan to shift sales responsibilities to the younger, predominantly female, RMAs. R. 29:45; 32:471-72; 32:510. Coupled with Haggar's mid-1990s campaign to present a more youthful image, a reasonable juror could conclude that Palasota was terminated because of his age.[13]

The district court also erred by discounting age-related remarks attributed to National Sales Manager Alan Burks and President Frank Bracken as "stray remarks." Relying on *Wyvill*, a pre-*Reeves* decision, the court found the remarks insufficient to create an inference of discriminatory intent. *Wyvill* stated that, for an age-based comment to be probative of an employer's discriminatory intent, it must be "direct

13. The district court also ignored the EEOC's determination of reasonable cause, made after a two and one-half year investigation, to believe that Palasota and similarly situated Sales Associates were discharged in violation of the ADEA. "An EEOC determination prepared by professional investigators on behalf of an impartial agency, [is] highly probative." *Plummer v. Western Int'l Hotels Co.*, 656 F.2d 502, 505 (9th Cir. 1981) (citing *Peters v. Jefferson Chem. Co.*, 516 F.2d 447, 450-51 (5th Cir. 1975)).

and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was a determinative factor in the decision to terminate the employee." 212 F.3d at 304. After *Reeves*, however, so long as remarks are not the only evidence of pretext, they are probative of discriminatory intent.[14]

Haggar argues that Bracken's comment that Haggar needs race horses, not plow horses, is not probative because "racehorses and plowhorses can be young or old." Similarly, the company argues that Bracken's comment that Palasota's sales techniques were out of the "old school" of selling relates to traditional practices, not age. As to Bracken's sales meeting comment that there was a "graying of the sales force" and Burks's statement that "we've got to find a way to get through it," Haggar contends these are objective observations, ambiguous, and insufficient to infer discrimination; the statements were also unconnected in time to Palasota's termination.

Post-*Reeves*, this court has taken a more "cautious" view of the stray remark doctrine discussed in *Wyvill. Russell v.*

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14. See *Russell*, 235 F.3d 219 at 229 n.19 ("*Rubinstein* stands only for the proposition that an overwhelming case that the adverse employment actions at issue were attributable to a legitimate, nondiscriminatory reason will not be defeated by remarks that have no link whatsoever to any potentially relevant time frame."); *see also Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 403 n.7 (5th Cir. 2001) (refusing to consider stray remarks as circumstantial evidence of age discrimination where no other evidence of pretext); *Rubinstein v. Adm'rs of Tulane*, 218 F.3d 392, 401 (5th Cir. 2000), *cert. denied*, 532 U.S. 937 (2001).

McKinney Hosp. Venture, 235 F.3d 219, 229 (5th Cir. 2000).[15] Age-related remarks "are appropriately taken into account when analyzing the evidence supporting the jury's verdict," even where the comment is not in the direct context of the termination and even if uttered by one other than the formal decision maker, provided that the individual is in a position to influence the decision. *Id.* Bracken and Burks, both members of upper management, were in such a position. The jury was entitled to believe Palasota's theory that older Sales Associates were pushed out in favor of younger RMAs as part of a plan to bring a more youthful appearance to Haggar. Alongside Palasota's establishment of a *prima facie* case and a fact issue as to the veracity of Haggar's stated grounds for termination, Bracken's and Burks's remarks were probative of discriminatory intent.

In granting the Judgment as a Matter of Law, the district court was not required to and did not reach the questions whether the evidence supported the jury's finding of willful discrimination and the award of back pay. Therefore we do not reach those issues.

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15. Even before the Court decided *Reeves*, this court noted that "the 'stray remark' jurisprudence is itself inconsistent with the deference appellate courts traditionally allow juries regarding their view of the evidence presented and so should be narrowly cabined." *Vance v. Union Planters Corp.*, 209 F.3d 438, 442 n.4 (5th Cir. 2000).

Appendix A

CONCLUSION

The district court erred in granting Judgment as a Matter of Law. The judgment of the district court is reversed, the verdict of the jury is reinstated, and the case is remanded to the district court.

REVERSED, JURY VERDICT REINSTATED, REMANDED.

APPENDIX B — MEMORANDUM ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION DATED AND FILED JUNE 26, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:00-CV-1925-G

JIMMY PALASOTA,

Plaintiff,

VS.

HAGGAR CLOTHING CO.,

Defendant.

MEMORANDUM ORDER

Before the court is the motion of the defendant, Haggar Clothing Company ("Haggar"), for judgment as a matter of law. For the following reasons, the motion is granted.

I. *BACKGROUND*

This case involves claims of age and gender discrimination. The plaintiff, Jimmy Palasota ("Palasota"), is a 57 year old male. Original Complaint and Jury Demand ("Complaint") at 2. He was 51 years old at the time of the acts complained of in this suit. *Id.* Palasota was employed

by Haggar as a Sales Associate from 1968 to May 10, 1996, a total of 28 years. *Id.* Throughout most of his career with Haggar, Palasota's major account was Dillard's Department Stores ("Dillard's"). Additionally, Palasota serviced some trade accounts and eight J.C. Penney stores in the Dallas/ Ft. Worth market. In December, 1995, Dillard's ceased purchasing Haggar products altogether. Subsequently, Haggar created an independent trade account territory specifically for Palasota. On April 29, 1996, Haggar informed Palasota that as a result of a reconfiguration of its sales staff, Palasota's position of Sales Associate was being eliminated, effective May 10, 1996. Complaint at 2. Haggar terminated Palasota on May 10, 1996. *Id.*

According to Palasota, Haggar's management felt that the company was not reaching the younger market, and in the mid-1990's began efforts to portray a younger, sexier image for the company. Palasota alleged that, as part of Haggar's attempt to change its market image with consumers and retailers, Haggar created the Retail Marketing Associate ("RMA") program to put "a younger look in the field" to sell its clothes to retailers. Palasota also asserted that over the few years prior to his termination, Haggar implemented policies in which responsibilities previously performed by Sales Associates were transferred to persons employed as RMAs. Complaint at 2. As a result of these changes, Palasota averred, the only apparent differences between the Sales Associate positions and the Retail Marketing Associate positions were the title and the pay, because many of the job responsibilities were essentially the same. *Id.* During this time, Haggar allegedly decreased the number of Sales Associates while increasing the number of Retail Marketing

Associates. *Id.* Palasota alleged that persons employed as Sales Associates were generally males over forty years old, while persons employed as Retail Marketing Associates were generally females under forty years old. *Id.* at 2-3. Thus, according to Palasota, Haggar's reconfiguration of its sales force over the past few years effectively shifted the sales responsibilities from men over forty years old to women under forty years old. Complaint at 3.

Palasota filed this suit on September 1, 2000, alleging claims against Haggar of age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and sex discrimination under Title VII of the Civil Rights Acts of 1964, 42 U.S.C. § 2000e *et seq. Id.* at 1.

On January 24, 2002, the nine member jury seated in this case rendered a unanimous verdict, partially in favor of Palasota, finding that Haggar had willfully discriminated against Palasota on the basis of his age and awarding Palasota back pay in the amount of $ 842,218.96 ("the verdict"). The jury did not find that Haggar had engaged in sex discrimination. Haggar moved for judgment as a matter of law at the close of evidence and again after the verdict. Haggar now renews the motion, asking the court to disregard the jury's verdict of age discrimination, willfulness and damages, and enter judgment in favor of Haggar. Defendant's Amended Post Verdict Motion for Judgment as a Matter of Law and Brief in Support ("JMOL Motion") at 1.

Appendix B

II. *ANALYSIS*

A. *Standard of Review*

The standard for analyzing a post-trial motion for judgment as a matter of law is well settled in the courts of the Fifth Circuit:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence — not just that evidence which supports the non-mover's case — but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury

> question. However, it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Boeing Company v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

Although motions for summary judgment under FED. R. CIV. P. 56 and motions for judgment as a matter of law under FED. R. CIV. P. 50 are similar "in that they challenge the existence of a genuine issue of fact and . . . seek a final judgment," *Urti v. Transport Commercial Corporation*, 479 F.2d 766, 768 (5th Cir. 1973), the court's previous denial of a motion for summary judgment does not preclude it from granting a motion for judgment as a matter of law. *See Gross v. Southern Railway Company*, 446 F.2d 1057, 1060 (5th Cir. 1971) ("It is settled in this Circuit . . . that prior denial of summary judgment does not rule out the possibility of a subsequent directed verdict."). This rule recognizes that "at times the issues may be such that only after the agony of a full-blown trial may it authoritatively be determined that there was never really the decisive issue of fact at all." *Robbins v. Milner Enterprises, Inc.*, 278 F.2d 492, 497 (5th Cir. 1960).

B. *Age Discrimination*

The burden-shifting framework expounded by the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981), is applicable

to cases brought under the ADEA. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 992-93 (5th Cir. 1996) (en banc). "'When a case has been fully tried on the merits, however, 'we need not parse the evidence into discrete segments corresponding to' the different stages of *McDonnell Douglas-Burdine* framework. Instead, applying Boeing's sufficiency of the evidence standards, we examine whether the plaintiff has met [his] ultimate burden of proving that the employer discriminated against [him] because of age." *Scott v. University of Mississippi*, 148 F.3d 493, 504 (5th Cir. 1998), citing *Travis v. Board of Regents of the University of Texas System*, 122 F.3d 259, 263 (5th Cir. 1997), *cert. denied*, 522 U.S. 1148, 140 L. Ed. 2d 176, 118 S. Ct. 1166 (1998).

While a plaintiff need not provide direct evidence to sustain a jury finding of discrimination, if circumstantial evidence is relied upon, it must be such that the factfinder could reasonably infer that age was a determinative reason for the employment decision. *Scott*, 148 F.3d at 504, citing *Travis*, 122 F.3d at 263. "Moreover, to give rise to such an inference of discrimination, the employee must provide some evidence, direct or circumstantial, to rebut each of the employer's proffered reasons and allow the jury to infer that the employer's explanation was a pretext for discrimination." *Scott*, 148 F.3d at 504. "The trier of fact may not simply choose to disbelieve the employer's explanation in the absence of any evidence showing why it should do so." *Id.*, citing *Swanson v. General Services Administration*, 110 F.3d 1180, 1185 (5th Cir.), *cert. denied*, 522 U.S. 948, 139 L. Ed. 2d 284, 118 S. Ct. 366 (1997).

Appendix B

Following a careful review of the evidence presented in this case, the court concludes that Palasota failed to provide sufficient evidence on which a reasonable trier of fact could find that Haggar's proffered reasons for Palasota's termination are pretexts or that Haggar's explanation is not credible.

C. *Palasota's Evidence*

Throughout the trial, Palasota referred to his case as a "puzzle" and asked the jurors to put the pieces of the puzzle together and find that Haggar had discriminated against him. *See generally* Trial Transcript from *Palasota v. Haggar Clothing Company* ("Transcript"). In *Little v. Republic Refining Company, Ltd.*, 924 F.2d 93 (5th Cir. 1991), the Fifth Circuit Court of Appeals analyzed the appeal of a judgment as a matter of law in an age discrimination suit where the district court had granted the employer's motion for judgment notwithstanding the verdict after the jury returned a verdict in the employee's favor. The Court of Appeals affirmed the district court's decision. *Id.* at 94. Like the district court in *Little, id.* at 96-98, this court finds that the evidence presented by Palasota could not justifiably lead reasonable jurors to conclude that Haggar discharged Palasota because of his age. The pieces of evidence presented by Palasota, and relied on by him to sustain the verdict, will now be discussed *seriatim*.

Appendix B

1. *Age-Based Comments*

Palasota relied on several age-related comments made by various persons in Haggar's management as proof that age-bias motivated his termination. Even assuming that those making the comments were decision-makers in Palasota's termination, their "stray remarks" are insufficient to create an inference of age discrimination. *Wyvill v. United Companies Life Insurance Company*, 212 F.3d 296, 304 (5th Cir. 2000), *cert. denied*, 531 U.S. 1145, 148 L. Ed. 2d 957, 121 S. Ct. 1081 (2001); *Waggoner v. City of Garland*, 987 F.2d 1160 (5th Cir. 1993). "In order for an age-based comment to be probative of an employer's discriminatory intent, it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was a determinative factor in the decision to terminate the employee." *Wyvill*, 212 F.3d at 304; *Equal Employment Opportunity Commission v. Texas Instruments, Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996), citing *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 958 (5th Cir. 1993).

Palasota relied on alleged age-related remarks attributed to Alan Burks ("Burks") and Frank Bracken ("Bracken"). Doug Moore ("Moore") testified that Burks stated, "Hey, fellows, let's face it, we've got an ageing, graying sales force out there. Sales are bad, and we've got to figure out a way to get through it." Defendant's Appendix at 36, 1 Transcript at 66, *ll.* 8-12. Bracken was identified as having stated, "We need racehorses, not plowhorses." Defendant's Appendix at 77-78, 4 Transcript at 476, *l.* 9 to 477, *l.* 10. James Thompson ("Thompson") testified that Bracken referred to Palasota as

being "out of the old school of selling." Defendant's Appendix at 78-79, 4 Transcript at 477, *l.* 19 to 478, *l.* 6. Palasota himself also testified that Bracken mentioned the "graying" sales force at a sales meeting once. Defendant's Appendix at 44-45, 3 Transcript at 289, *l.* 22 to 290, *l.* 2. Palasota admitted, however, that it was a truthful observation to say that the sales force was graying. Defendant's Appendix at 66-67, 3 Transcript at 405, *ll.* 12-22, 406, *ll.* 10-12.

The court agrees with Haggar (JMOL Motion at 17) that each of these statements is ambiguous as to the speaker's intent. The court in *Wyvill* analyzed far less ambiguous remarks, including a statement by the chief executive officer that he "felt that . . . [the older employees] were just too old to get the job done, and that we should either find another position for them or terminate them," and "that he wanted the company to be mean and lean, and he wanted to go to a young aggressive group of people." 212 F.3d at 304. The Court of Appeals, however, found that these "stray remarks" were "insufficient to create an inference of age discrimination." *Id. See also Bennett v. Total Minatome Corporation*, 138 F.3d 1053, 1061 (5th Cir. 1998) (reversing jury verdict for employee in ADEA case and rendering judgment for employer because none of the evidence, including statement by defendant's chairman of the board that company intended "to continue recruitment . . . focusing exclusively on young people," supported reasonable inference of age discrimination in that it did "not refer in any way to [the plaintiff's] age or the employment decisions of which he complains."). In light of *Wyvill* and *Bennett,* the court finds that the stray remarks Palasota attributed to Haggar's decision-makers are far too ambiguous to allow a reasonable

jury to conclude, without any inferences or presumptions, that age was a determinative factor in Haggar's decision to terminate Palasota.

2. *Disparate Treatment*

Palasota alleged that "the Defendant's actions constitute intentional age discrimination under 29 U.S.C. § 623(a)(1)." Complaint at 3. The court thus understands Palasota to be claiming disparate treatment rather than disparate impact.[1]

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1. Disparate impact claims, of course, do not require proof of intent to discriminate, *Hazen Paper Company v. Biggins*, 507 U.S. 604, 609, 123 L. Ed. 2d 338, 113 S. Ct. 1701 (1993), but they do require identification of specific practices as being responsible for any observed disparities. *Smith v. Texaco*, 263 F.3d 394, 403 n.4 (5th Cir. 2001), *opinion withdrawn and cause dism'd*, 281 F.3d 477 (2002); *Munoz v. Orr*, 200 F.3d 291, 299 (5th Cir.), *cert. denied*, 531 U.S. 812, 148 L. Ed. 2d 15, 121 S. Ct. 45 (2001). The Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA. *Hazen Paper*, 507 U.S. at 610. Nor has the Fifth Circuit, although three members of that court have interpreted *Hazen Paper* to mean "that disparate impact theory is not available under ADEA." *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1004 (5th Cir. 1996) (en banc) (separate opinion of DeMoss, Smith, and Barksdale, Circuit Judges). *See also Armendariz v. Pinkerton Tobacco Company*, 58 F.3d 144, 152 (5th Cir. 1995) ("Armendariz has apparently confused Title VII disparate impact case law with his own ADEA claim."), *cert. denied*, 516 U.S. 1047, 133 L. Ed. 2d 664, 116 S. Ct. 709 (1996). The other circuits have split on the question. See *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1323, 1326 (11th Cir. 2001) (holding disparate impact theory of liability unavailable under ADEA in Eleventh Circuit and surveying the decisions of other circuits). The Supreme Court declined to

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See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 153, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000) ("The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.").

Therefore, the court will focus solely on whether Palasota has proved disparate treatment.[2] Palasota's theory at trial was

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resolve this conflict among the circuits by dismissing the petition for certiorari in *Adams* as improvidently granted, __ U.S.__, 122 S. Ct. 1290 (April 1, 2002).

2. By definition, "disparate" means "unequal" or "dissimilar." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) at 653. Thus, disparate treatment necessarily requires a comparison, *i.e.*, a showing that the plaintiff and another employee were treated differently or "disparately." The language of the case law is replete with this requirement. *E.g., Okoye v. University of Texas Houston Health Science Center*, 245 F.3d 507, 514 (5th Cir. 2001) ("to establish disparate treatment a plaintiff must show that the employer gave preferential treatment to another employee under nearly identical circumstances") (internal quotation marks and brackets omitted); *Williams v. Trader Publishing Company*, 218 F.3d 481, 484 (5th Cir. 2000) ("To prove discrimination, a plaintiff may use circumstantial evidence that she has been treated differently than similarly situated non-members of the protected class."); *Garcia v. Woman's Hospital of Texas*, 143 F.3d 227, 231 (5th Cir. 1998) (In a Pregnancy Discrimination Act case, "the state of this evidence will not support a finding that Garcia was intentionally treated differently from other non-pregnant employees. . . ."); *Mayberry v. Vought Aircraft Company*, 55 F.3d 1086, 1091-92 (5th Cir. 1995) ("Mayberry has not offered evidence sufficient to support a finding that white

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that Haggar had an elaborate plan, dubbed by Palasota as a "youthanization," to replace its largely older, male sales force (Sales Associates) with a younger female sales force (Retail Marketing Associates or "RMAs"). *See generally* Transcript. However, this does not prove disparate treatment. To establish a claim of disparate treatment, Palasota had to show that Haggar gave preferential treatment to a younger employee under "nearly identical" circumstances. *Wyvill*, 212 F.3d at 304; *Little*, 924 F.2d at 97; *Hamilton v. Grocers Supply Co., Inc.*, 986 F.2d 97, 99 (5th Cir.), *cert. denied*, 508 U.S. 960, 124 L. Ed. 2d 679, 113 S. Ct. 2929 (1993); *Smith v. Wal-Mart Stores*, 891 F.2d 1177, 1180 (5th Cir. 1990) (per curiam). His attempted comparison with the RMAs, general and conclusory as it was, does not satisfy this standard.[3]

(Cont'd)

employees in circumstances 'nearly identical' to his have been treated differently.").

The converse has also been recognized. *Mason v. United Air Lines, Inc.*, 274 F.3d 314, 319 n.25 (5th Cir. 2001) (citing *Walton v. Bisco Industries, Inc.*, 119 F.3d 368, 373 (5th Cir. 1997), as holding that it is not discrimination for an employer "to treat differently situated employees differently."); *Wallace v. Methodist Hospital System*, 271 F.3d 212, 221 (5th Cir. 2001) ("put another way, the conduct at issue is not nearly identical when the difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer.") (citing *Wyvill v. United Companies Life Insurance Company*, 212 F.3d 296, 304-05 (5th Cir. 2000), and *Polanco v. City of Austin, Texas*, 78 F.3d 968, 977 (5th Cir. 1996)).

3. Palasota argues on this motion that, because the case has been fully tried, it is irrelevant now whether he proved that he was

(Cont'd)

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The plaintiff in *Wyvill* compared himself to a younger supervisor in a different office who, like himself, was guilty of abusive and rude conduct to staff and employees but who, unlike the plaintiff, did not lose his job as a result. *Wyvill*, 212 F.3d at 298, 304-05. The Court of Appeals held that this evidence did not show the circumstances of the two employees were nearly identical. *Id.* at 304-05. Likewise, the plaintiff in *Little* relied upon the fact that his replacement was 39-years-old, and the Court of Appeals dismissed this reliance as an insufficient basis to support the jury's verdict, stating that while "this fact was properly considered in establishing Little's prima facie case, . . . it is clearly insufficient for Little's ultimate burden of proving intentional age discrimination." *Little*, 924 F.2d at 98; *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215, 81 L. Ed. 2d 364, 104 S. Ct. 2658 (1984). Here, for similar reasons, Palasota's reliance on the fact that the RMAs were largely younger than himself is insufficient to prove disparate treatment.

3. *Anecdotal Evidence*

At Palasota's request, the court gave the following instruction to the jury regarding Palasota's contentions:

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replaced by a younger worker. Brief in Support of Plaintiff's Response to Defendant's Motion for Judgment as Matter of Law at 2, 14-16. He is correct on the issue of a *prima facie* case. *See* pp. 5-6 above. At the end of the day, however, he still has to compare himself to a younger worker under "nearly identical" circumstances to show that he was treated "disparately" because of his age. *See* nn.1 and 2 above. This comparison was never made.

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> Palasota contends that he was terminated from his employment with Haggar based upon his age and sex as part of a plan implemented by Haggar to eliminate older males from the sales force and transfer the sales responsibilities to younger females and that such transfer of responsibilities constituted age and sex discrimination.

Instructions at 12, Defendant's Appendix at 14.

There is no legally sufficient evidentiary basis to show that Palasota's sales responsibilities were in any way transferred to an RMA. In his testimony, Palasota admitted that the RMAs, who were working at J.C. Penney both before and after he left Haggar, were not taking over Palasota's sales responsibilities at the J.C. Penney stores for which Palasota had responsibility.[4] Palasota further admitted that "the RMA's

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4. Q: Now, your assignment of the eight Penney stores was going on up until the time of your separation from Haggar; is that correct?

A: That's correct.

Q: Now, the RMA's were calling upon those stores when you were initially assigned them in 1990, correct?

A: That's correct.

Q: And the RMA's continued calling on those stores the entire time you were assigned those eight stores, correct?

A: That's correct.

(Cont'd)

had no impact on [him] at Dillard's." Defendant's Appendix at 71, 3 Transcript at 372, *ll.* 8-10. The court agrees with Haggar's assertion that the record establishes that, with respect to his then-existing responsibilities, Palasota does not and cannot claim that an RMA took over any of his selling responsibilities or otherwise replaced him. JMOL Motion at 7.

Because he could not show that he personally was replaced by someone outside of the protected class, Palasota made much of the fact that the other sales associates were

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Q: And the RMA's were there after you left, correct?

A: I'm sure they were, yes.

Q: And so they were there before during and after you left, correct?

A: That's correct.

Q: And you never complained during the time you worked side by side with the RMA's that the RMA's were ever taking over your responsibilities in those stores?

A: Not my sales responsibilities, no.

Q: They weren't taking over your sales responsibilities, were they?

A: Oh, no.

Defendant's Appendix at 71-72, 3 Transcript at 273, *l.* 18 to 375, *l.* 14.

eventually phased out of the company completely. Palasota's own witness, Doug Moore, testified that the J.C. Penney accounts Palasota sought to have assigned to him before his departure from the company were assigned to two other Haggar sales associates, Randy Bailey and Barbara Bond. Defendant's Appendix at 41, 2 Transcript at 116, *ll.* 9-15. Palasota admitted that these assignments did not constitute age discrimination.[5] However, during Palasota's examination of Moore, Palasota presented evidence of alleged mistreatment

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5. Q: Now, do you contend that it was age discrimination for your accounts to go to fellow sales associates such as Randy Bailey and Dennis Bowie once you left Haggar?

A: No.

* * *

Q: And Ms. Bond was taking over some of the previously eight Penney stores assigned to you?

A: That's correct.

Q: And Barbara Bond was close to your own age, wasn't she?

A: That's correct.

Q: You agree the decision to assign Barbara Bond these J.C. Penney accounts as you left Haggar was not motivated by age discrimination?

A: No, they are correct.

* * *

(Cont'd)

of Haggar employees by Haggar, ranging from the termination for cause of five Sales Associates a year after Palasota's separation, to the alleged separation of Sales Associates assigned to the J.C. Penney account seventeen months after Palasota's separation. *See generally* 1 Transcript at 85, *l.* 6 to 96, *l.* 1. None of these allegations involved Palasota, and all of them took place at least a year after Palasota left Haggar.

In *Wyvill,* the Court of Appeals criticized the efforts of a plaintiff to introduce anecdotal testimony from and about former employees in an effort to show that the defendant employer had a "pattern or practice" of discriminating against older workers. *Id.*, 212 F.3d at 298, 302. These efforts fell short, said the court, because a "pattern or practice" of discrimination does not consist of "isolated or sporadic

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Q: And you are not contending that Haggar was engaging in age discrimination by assigning Randy Bailey to take over your AAFES account?

A: No, sir.

* * *

Q: You are not complaining about Ms. Bond taking over the accounts, are you?

A: Not at all.

Defendant's Appendix at 53-54, 55-56, 57, 75, 3 Transcript at 336, *l.* 25 to 337, *l.* 4; at 338, *l.* 24 to 339, *l.* 7; at 340, *ll.* 19-22; at 430, *ll.* 22-24.

discriminatory acts by the employer." "Rather, as the Supreme Court has explained, it must be established by a preponderance of the evidence that [the impermissible] discrimination was the company's standard operating procedure — the regular rather than the unusual practice." *Id.* at 302, citing *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875-76, 81 L. Ed. 2d 718, 104 S. Ct. 2794 (1984) (citations and internal quotation marks omitted). The court in *Wyvill* pointed out that such a pattern and practice is often revealed with statistical proof, and that the only way that anecdotes about other employees could be used to establish that discrimination is a company's standard operating procedure is if the employees the plaintiff compares himself to are similarly situated to the plaintiff. *Id.* at 302. Evidence about former employees who had different supervisors from Palasota, who worked in different parts of the company, or whose terminations were removed in time from Palasota's termination cannot be probative of whether age was a determinative factor in Palasota's discharge. *Id.* Clearly, the other Sales Associates remained at Haggar at least a year beyond Palasota's separation. This alone prohibits the court from considering anecdotal testimony regarding their treatment as evidence of Haggar's discrimination against Palasota.

C. *Other Issues*

Because Palasota has not demonstrated that Haggar unlawfully discriminated against him because of his age, it is unnecessary to address the issues of additional damages or willful discrimination which are, of course, dependent on a finding of age discrimination. *See Russell v. McKinney*

Hospital Venture, 235 F.3d 219, 230 (5th Cir. 2000) (quoting *Hansard v. Pepsi-Cola Metropolitan Bottling Company*, 865 F.2d 1461, 1470 (5th Cir.), *cert. denied*, 493 U.S. 842 (1989)).

III. *CONCLUSION*

For the reasons discussed above, Haggar's motion for judgment as a matter of law is **GRANTED.**

SO ORDERED.

June 26, 2002.

s/ A. Joe Fish
A. JOE FISH
Chief Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:00-CV-1925-G

JIMMY PALASOTA,

Plaintiff,

VS.

HAGGAR CLOTHING CO.,

Defendant.

JUDGMENT

This judgment is entered pursuant to F.R. CIV. P. 58 and the memorandum order of this date. For the reasons stated in that memorandum order, it is **ORDERED** that the plaintiff take nothing on his claims in this case and that the defendant recover its costs of court.

June 26, 2002.

s/ A. Joe Fish
A. JOE FISH
Chief Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR PANEL REHEARING AND REHEARING EN BANC DATED AND FILED OCTOBER 1, 2003

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-10844

JIMMY PALASOTA,

Plaintiff - Appellant

v.

HAGGAR CLOTHING CO.,

Defendant - Appellee

October 1, 2003, Filed

Before DAVIS, SMITH, and DUHE, Circuit Judges.

ON PETITION FOR REHEARING EN BANC

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled

on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ John M. Duhe, Jr.
John M. Duhe, Jr.
United States Circuit Judge

APPENDIX D — STATUTE INVOLVED

29 U.S.C. § 623

29 USC Sec. 623. – Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

Appendix D

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization –

* * *

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –

* * *

(B) to observe the terms of a bona fide employee benefit plan –

* * *

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.